

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

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U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
AKRON

IN RE:)	CASE NO. 04-50580
)	
BRETT SAILORS,)	CHAPTER 7
)	
DEBTOR(S))	JUDGE MARILYN SHEA-STONUM
)	
)	ORDER GRANTING TRUSTEE'S
)	MOTION TO DISMISS

This matter is before the Court on the Motion of the United States Trustee to Dismiss (the "Motion") this case pursuant to §707(b) of title 11 of the United States Code (the "Bankruptcy Code") and the Debtor's objection to that Motion (the "Objection"). The Court held an evidentiary hearing on the Motion and the Objection on August 18, 2004, which was adjourned until and concluded on September 24, 2004. The matter was then taken under advisement.

This proceeding arises in a case referred to this Court by the Standing Order of Reference entered in this District on July 16, 1984. It is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(A) over which this Court has jurisdiction pursuant to 28 U.S.C. §1334(b). Based upon the arguments of counsel and the pleadings filed in this chapter 7 case, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. On February 10, 2004, Brett Sailors (the "Debtor") filed a voluntary petition for relief under chapter 7 of the Bankruptcy Code. The Debtor is single with no dependents.

2. At the time of filing, the Debtor had \$101,500 in secured mortgage debt, and \$51,762.67 in unsecured nonpriority debt, primarily due to "miscellaneous" credit card debt. The Debtor did not contest the United States Trustee's (the "U.S. Trustee") assertion that his obligations are primarily consumer debt.
3. The Debtor is a sales director for Unicall International,¹ where he has been employed for the past five years.
4. The Debtor is paid an annual salary plus a commission based on his sales production, and as of April, 2004, his base salary was \$47,000. He has earned approximately \$73,000 annually for the past two years, and was expecting to earn approximately \$62,000 in 2004 in salary and commission.
5. The Debtor's "Schedule I - Current Income of Individual Debtors(s)" shows a monthly net income of \$3,637.72, and the Debtors's "Schedule J - Current Expenses of Individual Debtor(s)" shows monthly net living of \$3,416.17.
6. The Schedule J also reported a duplicate health insurance expense of \$68, an expense that was already listed as a payroll deduction on his Schedule I. Based on this correction, the correct addition of the Debtor's Schedule J yields a sum of \$3,348.33.
7. The Debtor's Schedule J reported, *inter alia*, monthly expenses for recreation of \$400, for electricity and water expenses of \$325 and \$80, respectively, and a \$50

¹ Debtor testified that he is employed by Unicall International, but his schedules identify his employer as Vico International. Despite the differing names, Debtor testified he has been employed by the same company for over 5 years.

Shell credit card payment.

8. The Debtor's recreation expenses represents social entertainment for him and his fiancé, and unreimbursed business expenses such as taking a prospective client out for lunch, giving gifts to the employees he supervises and subscribing to trade magazines to keep current on his industry.
9. The Debtor's fiancé lives with him and she does not contribute to the utilities, food, or mortgage expenses listed on his Schedule J. The Debtor's fiancé works outside the home as a licensed real estate agent.
10. The Debtor continues to pay \$50 a month to a Shell credit card so he can purchase gas and miscellaneous items such as milk, bread, or cigarettes. The Debtor did not include this debt in his "Schedule F - Creditors Holding Unsecured Nonpriority Claims."
11. In recent years the Debtor has sought professional assistance in preparing his taxes and in 2002 and 2003, his tax refunds were \$3,900 and \$6,500, respectively. The Debtor claims unreimbursed business expenses on his tax returns.
12. The Debtor's honesty is not in question, so the Court will review the matter with respect to the Debtor's need only.

DISCUSSION

The United States Trustee (the "U.S. Trustee") contends that the Debtor has the ability to repay his creditors and that, under § 707(b) of the Bankruptcy Code, it would be substantial abuse to grant him a chapter 7 discharge. Section 707(b) of the Bankruptcy Code

provides in pertinent part that:

[a]fter notice and a hearing, on its own motion or on a motion by the United States trustee, . . . may dismiss a case filed by an individual debtor under this chapter whose debts are primarily consumer debts if it finds that the granting of relief would be a substantial abuse of the provisions of this chapter. There shall be a presumption in favor of granting the relief requested by the debtor

The party seeking dismissal of a case under § 707(b) has the burden of proof by a preponderance of the evidence. *In re Summer*, 255 B.R. 555, 563 (Bankr. S.D. Ohio 2000).

The statute requires the movant first establish that the obligations are primarily consumer debts, and second, that granting a discharge would constitute a substantial abuse of the chapter 7 provisions. Here, the Court is left to determine only whether discharge of the Debtor's obligations would be substantial abuse under the Code.

Though the Bankruptcy Code does not define "substantial abuse," the Sixth Circuit Court of Appeals has held that "substantial abuse can be predicated upon either lack of honesty or want of need." *In re Krohn*, 886 F.2d 123, 126 (6th Cir. 1989). In evaluating whether a debtor is "needy," this Court must first look at the debtor's ability to repay his creditors out of future earnings, which taken alone, can justify dismissal of a chapter 7 case under § 707(b). *Id.* Upon finding the debtor can repay his creditors, the Sixth Circuit also allows the Court to consider other circumstances that would defeat § 707(b)'s presumption in favor of granting the debtor chapter 7 relief, as requested. The debtor may also proffer evidence supporting the appropriateness of chapter 7 relief and demonstrating that such relief would not result in substantial abuse, including: the debtor's access to a stable source of income; whether the debts could be adjusted through a chapter 13 plan; whether there are

state remedies that could ease his financial predicament, the degree of relief available through private negotiations, whether his expenses can be reduced significantly without depriving him of adequate food, clothing, shelter and other necessities, and whether the debtor's financial situation is the result of any unforeseen or catastrophic events. *In re Behlke*, 358 F.3d 429, 434 (6th Cir. 2004); *See In re Mooney*, 313 B.R. 709, 717 (Bankr. N.D. Ohio 2004) (noting that, while *Krohn* used the existence of unforeseen or catastrophic events in determining lack of honesty, it is also highly probative of debtors' need, as argued in *Behlke*).

When assessing the debtor's ability to pay, courts typically look at the debtor's ability to fund a chapter 13 plan using his "disposable income." The Code defines "disposable income" as income "which is received by the debtor[s] and which is not reasonably necessary to be expended . . . for the maintenance or support of the debtor[s] or a dependent of the debtor[s]." 11 U.S.C. §1325(b)(2). On an initial review of the Debtor's schedules, he appears to have roughly \$290 of disposable income available per month per with which to pay his creditors. Furthermore, the Court finds the Debtor's \$400 monthly recreation and entertainment expenses are exorbitant considering he is single and without any dependents, and are well outside the amount other courts have allowed for individual debtors. *In re Braithwaite*, 192 B.R. 882 (Bankr. N.D. Ohio 1996) (finding substantial abuse where individual debtor spent \$96 on recreation); *In re Sanseverino*, 171 B.R. 46 (Bankr. N.D. Ohio 1994) (finding substantial abuse where individual debtor spent \$100 on recreation for himself). In addition, though the Debtor may feel obligated to entertain clients or reward his employees, he failed to prove with any specificity what portion of the budgeted recreation

amounts are for business, as opposed to personal matters. Further, some courts have found the money spent on those items is considered part of his disposable income under the Code. *See In re Cohen*, 246 B.R. 658, 668 (Bankr. D.Colo. 2000) (holding that unreimbursed business expenses are not expenses reasonably necessary for the maintenance or support of the debtor and are included in the debtor's disposable income calculation). Based on the Debtor's vague and unspecific testimony on this matter, it is impossible for the Court to determine what amount of the \$400 expense consists of unreimbursed business expense versus other recreational spending. For the purposes of dealing with this Motion, the Court will simply use a "plug" figure of \$200 in this category.

Similarly, the Court also finds the scheduled electricity and water expenses are excessive and maintains that, though the term "dependent" (used in defining "disposable income") should be interpreted broadly, it was not intended to include support for a debtor's wage-earning fiancé. *See Collier on Bankruptcy*, ¶ 1325 at 1325-54 (15th ed. 1989); *see also In re Cox*, 249 B.R. 29,32 (Bankr. N.D. Fla. 2000) (finding it unreasonable for a debtor to incur food expenses for his fiancé and her children). Although the Debtor represented that he had "understated" several of his expenses, he later testified that he didn't think his expenses were understated enough to warrant filing an amended schedule.² Upon reducing the Debtor's utilities and food expenses in these categories to those reasonably necessary for *his* maintenance and support, the Court is confident additional disposable income would be available to his creditors.

While this Court does not determine substantial abuse solely on the basis of Debtor's

² The Debtor testified, "I might have undershot it by approximately \$10-15 a month . . . it was nothing shocking."

ongoing but unscheduled monthly payments to his Shell credit card, some courts have seen fit to do so. *In re Attanasio*, 218 B.R. 180, 222 (Bankr. W.D. Alabama 2000) (citing cases where substantial abuse was found when debtors demonstrated a preference for repayment to one creditor over others, omitted select creditors from their schedule in order to keep using a credit card, or skewed their disposable income by including the monthly payments to a preferred creditor, thereby artificially increasing their expenses and decreasing the true disposable income available to repay all creditors). At a minimum, however, the \$50 payment represents an unquestionable source of additional disposable income that can be shared pro-rata among all unsecured creditors, as the Code was designed to do and overall bankruptcy policy dictates.

In summary, the Debtor has \$290 in disposable income identified from schedules, and the Court has identified, at a minimum, an additional \$250 that can be considered in calculation of the Debtor's disposable income based on reasonable reductions to his entertainment and consideration of his monthly credit card payment, which could be available immediately to repay creditors. Furthermore, the Court finds that the Debtor's food and utility expenses are overstated in that they include funds connected to supporting his non-dependent fiancé, and that the Debtor's tax withholdings well above what his tax obligations are.³ In total, the Debtor has at least \$540, and likely closer to \$900,⁴ available

³ Even with a lower income expected this year, if the Debtor received a tax refund of \$3,900, there is approximately \$320 per month that could go to unsecured creditors, and with a tax refund of \$6,500, the Debtor would have approximately \$540 per month available to pay unsecured creditors.

⁴ The \$900 estimate is the sum of \$540 previously itemized amount (\$290 scheduled amount plus the \$250 from reductions in recreation and elimination of current credit card payment), plus the low estimate of his annual tax refund (\$320 per month), and an estimated \$40 per month reduction

per month with which he could fund a chapter 13 plan and make meaningful repayment to unsecured creditors in the range of 38-63% under a 36 month plan.⁵

Having found that the Debtor has the ability to repay creditors, at least in part, the Court looks to whether the Debtor presents any evidence to rebut the presumption that granting a chapter 7 discharge would constitute substantial abuse of the Code, and finds none. In fact, the Debtor's testimony more often supported a finding of substantial abuse, rather than mitigating against it. The Debtor has worked for the same employer for over five years and, while paid partially on a commission basis and expecting a diminution in annual compensation, he has proffered no evidence to suggest his job is in jeopardy or that he lacks the requisite skills necessary to maintain gainful employment; in fact, the Debtor testified that he recently received a merit increase of 7%, suggesting he is performing well at his job. Despite the Debtor's testimony that he lives "paycheck to paycheck" and "could not survive strictly on a salary alone," as a single person without dependants earning \$47,000 in base salary, he out-earns most single family households in this area by nearly \$5,000,⁶ and

to his food and utility expenses to reflect amounts spent for his support only.

⁵ If the Debtor were to pay \$540 per month for 36 months, he could repay 38% of his debts. Alternatively, if he were to pay \$900 per month for 36 months, he could repay 63% of his debts. This Court has already held that the percent of repayment to creditors is not determinative of a debtor's ability to repay creditors. See *In re Behlke* 358 F.3d at 437 (adopting this Court's finding that repaying only a 14% dividend to creditors does not influence the Court's analysis of the debtors' ability to pay in a case of substantial abuse). These estimated distributions to creditors do not take into account chapter 13 trustee's administration fees.

⁶ See U.S. Census Bureau, 2000 Census of Population and Housing, available at: http://fedstats.gov/qf/meta/long_101616.htm. According to the most recent census data, the median household income in Cuyahoga Falls, Ohio is \$42,263, and the median home price is \$106,100, both of which are slightly higher than the Ohio median levels, which are \$40,956 and \$103,700 respectively. With respect to this case, the value of the Debtor's home is consistent with the market (purchased for \$102,800 in 2001), but his income is well above the median for this area (earning \$73,000 in 2002 and 2003).

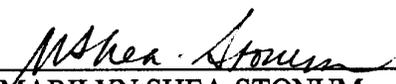
expects to earn nearly \$15,000 in addition from his commission. Furthermore, the Debtor testified he has researched the status of his debt with unsecured creditors and that some have written it off already, suggesting to the Court that there is a legitimate opportunity to negotiate relief and reduce the amount of his debts far below the \$51,762.67 scheduled. Despite the Debtor's testimony that paying \$250 to \$300 per month to his creditors would "not . . . make a difference to them," whether or not repayment of any amount of debt will make a difference to his creditors is not relevant to this Court's determination of substantial abuse. The Debtor willfully incurred want-driven debt beyond his ability to repay in full, perhaps, but permitting him to ignore available procedures that would result in a meaningful dividend to his creditors would be a substantial abuse of chapter 7.

Without dissecting the Debtor's expenses any further, the Court is confident that the Debtor's expenses can be reduced significantly without depriving him of adequate food, clothing, shelter and other necessities, and the Debtor presented no evidence that his escalating debt was due to illness, disability, unemployment or catastrophic events.

CONCLUSION

Because the U.S. Trustee has demonstrated that the Debtor is not "needy" and that granting him a chapter 7 discharge would be a "substantial abuse" of the bankruptcy system, the Motion to Dismiss will be granted. However, the Debtor will be given ten days from the date of entry of this Order to convert this case to one under chapter 13 of the Bankruptcy Code. If a notice of conversion is not timely filed, this chapter 7 case will be dismissed without further notice or hearing.

IT IS SO ORDERED.



MARILYN SHEA-STONUM
Bankruptcy Judge

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this *23rd* day of FEBRUARY, 2005 the foregoing Order was sent via regular U.S. Mail to:

CHRIS MANOS
2745 Nesbitt Rd.
Akron, OH 44319

DERRICK V. RIPPY
Office of the United States Trustee
BP Tower, 200 Public Square
20th Floor, Suite #3300
Cleveland, OH 44114



Clerk